Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

NICK S. BOSCARINO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether honest services fraud may serve as a money laundering predicate offense where the statute listing money laundering predicate offenses does not include the honest services statute?

2. Whether a sentence within a range established by the United States Sentencing Guidelines is entitled to a rebuttable presumption of reasonableness?

3. Whether a federal court has authority to order restitution under the Mandatory Victims Restitution Act to an entity that did not have any legal entitlement to funds for which restitution was ordered?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PRAYER	1
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	9
I. HONEST SERVICES FRAUD DOES NOT QUALIFY AS A MONEY LAUNDERING PREDICATE OFFENSE	9
II. THE APPLICABLE SENTENCING STATUTE DOES NOT MAKE THE UNITED STATES SENTENCING GUIDELINES PRESUMPTIVELY REASONABLE AND PETITIONER'S SENTENCE WAS UNDULY DISPARATE WHEN COMPARED TO THE SENTENCE IMPOSED ON HIS CO-DEFENDANT	15
III. UNDER THE MANDATORY VICTIMS RESTITUTION ACT, RESTITUTION CANNOT BE ORDERED TO AN ENTITY THAT DID NOT SUSTAIN PECUNIARY LOSS AS A RESULT OF THE OFFENSE	18
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Cleveland v. United States, 531 U.S. 12 (2000) 14

Doe v. Roe, 958 F.2d 763 (7th Cir. 1992) 13

Harrison v. United States, 7 F.2d 259 (2d Cir. 1925) 9

Hecht v. Commerce Clearing House, Inc. 897 F.2d 21 (2d Cir. 1990) 13

Hughey v. United States, 495 U.S. 411 (1990) 19, 20

Jennings v. Emery, 910 F.2d 1434 (7th Cir. 1990) 13

McNally v. United States, 483 U.S. 350 (1987) 11, 12, 15

O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989) 13

Pasquantino v. United States, 544 U.S. 349, 125 S. Ct. 1766 (2005) 14

R.E. Davis Chemical Corp. v. Nalco Chemical Corp., 757 F. Supp. 1499 (N.D. Ill. 1990) 13

United States v. Booker, 543 U.S. 220 (2005) ... 8, 15, 16, 17

United States v. Boscarino, 437 F.3d 634 (7th Cir. 2006) 9, 11, 14, 20

United States v. Ellis, 440 F.3d 434 (7th Cir. 2006) 16

United States v. Genova, 333 F.3d 750 (7th Cir. 2003) ... 12, 13

United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) (en banc) 16

United States v. McGee, 408 F.3d 966 (7th Cir. 2005) 18

United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Martinez, 978 F. Supp. 1442 (D. N.M. 1997) 20

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005) 16

United States v. Owens, 441 F.3d 486 (7th Cir. 2006) 16

United States v. Napoli, 54 F.3d 63 (2d Cir. 1995) 12

United States v. Randle, 324 F.3d 550 (7th Cir. 2003) 20

United States v. Ranum, 353 F. Supp.2d 984 (E.D. Wis. 2005) 16

United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002) 14

United States v. Shepard, 269 F.3d 884 (7th Cir. 2001) 20

United States v. Walters, 997 F.2d 1219 (7th Cir. 1993) 14

United States v. Williams, 436 F.3d 767 (7th Cir. 2006) 16

United States v. Wilson, 350 F. Supp.2d 910 (D. Utah 2005) 16

STATUTES AND LAWS

215 ILCS 5/507.1 19

18 U.S.C. § 371 6

18 U.S.C. § 1341 ..... 12, 14

18 U.S.C. § 1343 ..... 6, 12, 14

18 U.S.C. § 1346 ..... 6, 10, 11, 12, 13

18 U.S.C. § 1956(c)(7) 2, 10, 12

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1956(h) 5
18 U.S.C. § 1957 ..... *passim*
18 U.S.C. § 1957(a) 13
18 U.S.C. § 1957(f)(3) 14
18 U.S.C. § 1961(1) 2, 12, 13
18 U.S.C. § 3553(a) 3, 8, 16, 17
18 U.S.C. § 3553(a)(6) 18
18 U.S.C. § 3613A 18
18 U.S.C. § 3663(a)(2) 19
18 U.S.C. § 3663A 18
18 U.S.C. § 3663A(a)(1) 2, 19
18 U.S.C. § 3663A(a)(2) 3, 19
18 U.S.C. § 3663A(c)(1)(B) 2, 19
26 U.S.C. § 7206(1) 6
26 U.S.C. § 7206(2) 6
28 U.S.C. § 1254(1) 1
Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283 11
Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 11
Pub.L. No. 99-570 9
Pub.L. 103-132, Title II, subtitle A, 110 Stat. 1227 18

MISCELLANEOUS

American Heritage Dictionary (4th ed.) 14
Black's Law Dictionary (8th ed. 2004) 14

TABLE OF AUTHORITIES – Continued

Page

DeLay Is Indicted Again in Texas; Money Laundering Is Charge, NY Times.com (October 4, 2005)..... 15

Money Laundering, FBI Law Enforcement Bulletin v.70, no.5, p.1-9 (May 2001)..... 10

PRAYER

Petitioner Nick S. Boscarino respectfully prays that a writ of certiorari issue to review the judgment and order of the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion affirming the petitioner's conviction and sentence is published at 437 F.3d 634 and is attached in Appendix A ("App. A"). The judgment of the district court is unpublished and is attached in Appendix B.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment affirming the petitioner's conviction and sentence on February 8, 2006. App. A. This petition has been filed within 90 days of the Seventh Circuit's judgment. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. In pertinent part, 18 U.S.C. § 1957 provides:

> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

* * *

(f) As used in this section –

* * *

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

2. In pertinent part, 18 U.S.C. § 1956(c)(7) states:

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title . . .

3. In pertinent part, 18 U.S.C. § 1961(1) provides:

As used in this chapter –

(I) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . .

4. Title 18, United States Code, § 1346, provides, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.

5. The Mandatory Victims Restitution Act provides that the court shall order restitution to victims of specified offenses that result in "an identifiable victim . . . [who] has suffered . . . pecuniary loss." 18 U.S.C. § 3663A(a)(1) and (c)(1)(B).

The word "victim" is defined as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered" or "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2).

6. Title 18, United States Code, § 3553(a) provides:

> (a) Factors To Be Considered in Imposing a Sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to

any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

1. A superseding indictment named the petitioner, Ralph Aulenta ("Aulenta") and Irving Mangurten ("Mangurten") as defendants. Aulenta pled guilty, agreed to cooperate and testified against the petitioner. The district court severed Mangurten, an accountant who prepared the petitioner's personal and corporate tax returns and performed bookkeeping work for the petitioner's companies. Trial Transcript ("Tr.") 1299. Mangurten testified as a defense witness at the petitioner's trial, and later entered a guilty plea to a perjury charge.

Trial commenced on January 30, 2004 and ended on February 17, 2004. The jury returned guilty verdicts on counts charging money laundering conspiracy, 18 U.S.C. § 1956(h), substantive money laundering, 18 U.S.C.

§ 1957(a), tax conspiracy, 18 U.S.C. § 371, and filing false tax returns, 26 U.S.C. § 7206(1) and (2). District Court Document ("R.") 142, 229.

Count One charged that the petitioner and Aulenta, the president of a local office of an insurance brokerage known as ABI/Acordia, Inc. ("ABI/Acordia"), schemed to defraud ABI/Acordia of money and Aulenta's honest services in relation to insurance provided to the municipality of Rosemont, Illinois, 18 U.S.C. §§ 1343 and 1346. R. 23. Count One did not name Rosemont as a victim. Although the government moved to dismiss Count One prior to trial, honest services fraud remained in the case as the predicate offense for a series of substantive money laundering charges under 18 U.S.C. § 1957. *See* R. 136 (jury instructions).

2. Petitioner was a successful businessman in non-insurance fields. Tr. 451, 683, 1377. Petitioner was friendly with Rosemont officials. He owned a restaurant in the Rosemont Village Hall, operated a business that rented equipment to an exposition center in Rosemont and operated an office building cleaning service with the son of Rosemont's long-time mayor. Tr. 69-70, 457, 480-81, 675, 679, 682-83, 910-13, 1298-99, 1379-82. ABI/Acordia sometimes served as an insurance broker for the petitioner's companies. Tr. 451, 683, 1377.

Petitioner and Aulenta were friendly. In the summer of 1990, the petitioner asked Aulenta if he would be interested in bidding on Rosemont's insurance. Tr. 67, 71-72, 255. In late fall 1990, the petitioner arranged a meeting between Aulenta and Rosemont officials. Tr. 73. ABI/Acordia won Rosemont's insurance business, and brokered insurance coverage for Rosemont between 1991 and 1996.

ABI/Acordia occasionally paid referral fees to non-employees, and Aulenta viewed referral fees as "perfectly legal." Tr. 67, 391, 393. Aulenta agreed to give the petitioner a referral fee. Tr. 76.

In 1991 and 1992, ABI/Acordia prepared $33,670 and $45,000 checks, respectively, payable to one of the petitioner's companies. Tr. 121-22, 403-09, 745. Petitioner endorsed the checks and returned them to Aulenta. Tr. 123-24, 316. Aulenta testified that he provided the petitioner with ½ of the proceeds in cash payments. Tr. 130-31, 164-69.

In January 1993, Aulenta and the petitioner opened a joint trading account at Charles Schwab. Tr. 173-79, 766, 794. Petitioner's information was disclosed in the Schwab file. Tr. 287, 794. The referral fees between 1993 through 1996 were ultimately deposited into the Schwab account. Tr. 173-74, 184, 192, 543-46, 766, 769, 773, 795.

The referral fee payments were denoted in ABI/Acordia's files around the time of the withdrawals. Tr. 105-07, 140-41, 181, 188-89, 194-97, 338, 349, 355, 360-61, 368, 432, 436. Apart from the referral fees, ABI/Acordia, with knowledge of its employees who administered the account, overcharged Rosemont approximately $225,081 between 1992 and 1996. Tr. 333, 337-38, 365; Pre-Sentence Investigation Report ("PSR"), Deft's Version.

Aulenta did not inform the petitioner that he was obtaining the fee illegally or against company policy. Tr. 261, 312. Aulenta did not disclose to the petitioner that he was padding Rosemont's bill or violating the law. Tr. 294. Nor did Aulenta disclose to the petitioner ABI/Acordia's internal accounting mechanisms (ABI/Acordia sometimes

treated the checks as return of premiums to the petitioner's companies). Tr. 314.

A total of $210,827 was deposited into the Schwab account. Tr. 779, 807. By December 31, 1996, the Schwab account had increased in value to $352,674. Tr. 780. In early 1997, the petitioner and Aulenta closed the account. Tr. 204-08. The withdrawals from the Schwab account and subsequent deposits were the "monetary transactions" charged in money laundering counts. Tr. 204-08; R. 23.

3. Aulenta was the one who violated a fiduciary duty to his employer, and defrauded Rosemont. In addition, Aulenta committed other frauds that had no connection to the petitioner. Tr. 241-47. Aulenta admitted to such offenses in a plea agreement, and the district court ordered him to pay a total of $2,006,316 in restitution to five victims, including ABI/Acordia. R. 114, 177. Petitioner was ordered to pay $288,670 in restitution to one entity, ABI/Acordia (on a joint and several basis with Aulenta). 5/18/05 Tr. 54; R. 229.

The district court sentenced Aulenta to 20 months imprisonment. At sentencing, the petitioner asserted that, under *United States v. Booker*, 543 U.S. 220 (2005), and 18 U.S.C. § 3553(a)(6), the incarceration portion of the sentence should not exceed 20 months. 5/18/05 Tr. 31-34, 36-38. Not "shocked" by the disparate treatment and unwilling to second-guess an executive decision, the district court rejected the petitioner's argument. 5/18/05 Tr. at 38-42. The court imposed a 36-month prison sentence, which was within the middle of the United States Sentencing Guidelines range found by the court.

4. Petitioner appealed his conviction. In an opinion written by Judge Easterbrook, the United States Court of

Appeals for the Seventh Circuit affirmed. *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006); App. A.

The court addressed three issues in its opinion. First, the court ruled that the honest services statute could serve as a predicate for a money laundering charge even though that statute is not included in the statutory list of money laundering predicate offenses. Second, the court held that ABI/Acordia was a proper restitution payee even though ABI/Acordia had bilked Rosemont out of the funds for which restitution was ordered. Third, the court presumed that the sentence was reasonable because it was within the guidelines range, and did not discern any unwarranted disparity between the sentences of Aulenta and the petitioner.

REASONS FOR GRANTING THE PETITION

I. HONEST SERVICES FRAUD DOES NOT QUALIFY AS A MONEY LAUNDERING PREDICATE OFFENSE

Unknown at common law, the offense of money laundering, since its inception in 1986, Pub.L. No. 99-570, has emerged as a "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.). Although money laundering statutes criminalize certain monetary or financial transactions which are obviously ubiquitous in our modern society,[1] their reach is

[1] As stated in an FBI Law Enforcement Bulletin:

> The International Monetary Fund estimates that the amount of money laundering occurring on a yearly basis could range between 2 and 5 percent of the world's gross

(Continued on following page)

not unlimited. Not every financial transaction involving proceeds of criminal activity constitutes the offense of money laundering.

At bottom, interpretation of the money laundering statutes must be grounded in statutory language. Here, however, the court of appeals affirmed the petitioner's money laundering convictions where the predicate offense is not set forth in the statutory list of predicate offenses. This is an unwarranted expansion of the money laundering statutes, and allows money laundering prosecutions beyond those intended by Congress.

To establish a violation of 18 U.S.C. § 1957(a), the government must prove that the criminally derived property (valued over $10,000) involved in the monetary transaction "is derived from specified unlawful activity." The term "specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) – a statute that does not list, or cross-reference, the honest services statute, 18 U.S.C. § 1346.

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domestic product – or somewhere between $600 billion and $1.5 trillion. Estimates come from a variety of sources based upon both macroeconomic theories and on microeconomic approaches. The U.S. Department of the Treasury has suggested that $600 billion represents a conservative estimate of the amount of money laundered each year, and some U.S. law makers believe that, not only does the amount lie somewhere between $500 billion and $1 trillion, but that half is being laundered through U.S. banks. Due to the clandestine nature of laundering activity, governments and concerned organizations cannot accurately quantify the amount of money laundered each year. Some estimates suggest that the amount of money laundered each year is approximately $2.8 trillion, an amount more than four times greater than the figure generally accepted.

Money Laundering, FBI Law Enforcement Bulletin v.70, no.5, p.1-9 (May 2001).

In the district court, the petitioner asserted that honest services fraud could not produce proceeds capable of being laundered. Tr. 499-500, 1534, 1642-43. The district court initially determined that honest services instructions could constitute error because § 1346 did not refer to a scheme to defraud another of money. Tr. 1532-33. The court, however, reconsidered, and instructed the jury on honest services fraud since the dismissed wire fraud count alleged a violation of the honest services statute. Tr. 1533.

The Seventh Circuit affirmed. The court found the absence of the honest services statute in the definition of "specified unlawful activity" to be inconsequential because § 1346 constitutes a "definitional clause." *Boscarino*, 437 F.3d at 636; App. A-3. The court cited no authority to support this conclusion.

The legal error in the court of appeals' analysis is evident from the mail fraud statute's history. First enacted in 1872, the statute was one section in a recodification of the Postal Act. *See* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283. The statute has been the subject of a variety of modifications throughout the years, most notably the 1909 amendment that added the language "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. This amendment, a central focus of *McNally v. United States*, 483 U.S. 350 (1987), confirmed the necessity for a mail fraud charge to be premised upon a deprivation of "money or property."

In response to *McNally*, Congress criminalized honest services fraud by passing 18 U.S.C. § 1346 as part of the Anti-Drug Abuse Act of 1988. The honest services statute

provides, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

Section 1957 requires the "criminally derived property . . . [be] derived from specified unlawful activity." Section 1956(c)(7) states that "any act or activity constituting an offense listed in" 18 U.S.C. § 1961(1) may serve as a money laundering predicate. Section 1961(1) references "any act which is indictable under . . . section 1341 (relating to mail fraud) [or] section 1343 (relating to wire fraud) . . . " At no time since the enactment of the honest services statute has Congress enlarged the list of offenses in § 1956(c)(7) or § 1961(1) to include § 1346.

McNally makes clear that §§ 1341 and 1343 – statutes that are listed as appropriate money laundering predicates in § 1961(1) – do not facially proscribe a scheme to defraud another of honest services. Absent § 1346, an honest services fraud scheme simply does not amount to an "act which is indictable under" §§ 1341 or 1343. As a matter of statutory interpretation, therefore, honest services fraud may not serve as a money laundering predicate.[2] *Cf. United States v. Napoli*, 54 F.3d 63, 67-68 (2d Cir. 1995) (engaging in financial transactions with theft proceeds did not constitute money laundering since theft is not a predicate act listed in §§ 1956(c)(7) or1961(1)); *see also United States v. Genova*, 333 F.3d 750, 757 (7th Cir. 2003) (State official misconduct offense did not constitute proper

[2] It also bears noting that § 1346 limits its terms to "this chapter." 18 U.S.C. § 1346. The money laundering statute, however, appears in a different chapter of the United States Code.

RICO predicate act); *Jennings v. Emery*, 910 F.2d 1434, 1438 (7th Cir. 1990) (civil RICO complaint deficient because "[m]ost all of the purported racketeering acts listed are outside the scope of" § 1961); *Hecht v. Commerce Clearing House, Inc.* 897 F.2d 21, 25 (2d Cir. 1990) (Congress did not deploy RICO "as an instrument against all unlawful acts. It targeted only predicate acts catalogued under 1961(1)."); *O'Malley v. O'Neill*, 887 F.2d 1557, 1159 n.5 (11th Cir. 1989) (pre-§ 1346 decision, stating that "a plaintiff in a civil RICO action, when relying on the predicate acts of mail fraud, must show proof of loss of tangible property resulting from the defendant's conduct"); *R.E. Davis Chemical Corp. v. Nalco Chemical Corp.*, 757 F. Supp. 1499, 1509 (N.D. Ill. 1990) (conspiracy to commit mail fraud does not qualify as RICO predicate act). The Seventh Circuit's decision in this case conflicts with this authority.[3]

In addition, examination of the money laundering statute shows that "honest services" cannot constitute "money," "property" or "proceeds" capable of being laundered in a financial transaction. Section 1957(a) specifically

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[3] This is not the only case in which the Seventh Circuit has indicated that honest services fraud may serve as a RICO predicate act. In *Genova*, Seventh Circuit affirmed a RICO conviction, which included honest services mail fraud predicate acts. The *Genova* defendant, however, did not assert that his honest services mail fraud convictions should be reversed because § 1346 is not in § 1961(1)(B). In *Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992), the court affirmed the dismissal of a civil RICO action in which some of the predicate acts sounded in honest services mail fraud. *Doe* determined that the plaintiff failed to allege an injury to property or business, necessary for civil mail fraud-based RICO. In *dicta*, the *Doe* court stated that § 1346 falls "within the RICO definition of a racketeering act" and possibly "could serve as predicate racketeering acts." 958 F.2d at 767 and 769 n.5.

requires that property involved in the monetary transaction be "criminally derived property," meaning "any property constituting, or derived from, proceeds obtained from a criminal offense," § 1957(f)(3).

The words "money" and "property" plainly do not encompass the intangible right to honest services. As this Court has recognized, mail/wire fraud under 18 U.S.C. §§ 1341 and 1343 requires the "object of the fraud . . . be '[money or] property in the victim's hands.'" *Pasquantino v. United States*, 544 U.S. 349, 125 S. Ct. 1766, 1771 (2005) (quoting *Cleveland v. United States*, 531 U.S. 12, 26 (2000)). Similarly, the word "proceeds" does not encompass the intangible right to honest services, and has been defined in economic terms. *See United States v. Scialabba*, 282 F.3d 475, 478 (7th Cir. 2002) ("the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture"); *American Heritage Dictionary*, 544 (4th ed.) (defining "proceeds" as "[t]he amount of money derived from a commercial or fund-raising venture; the yield"); *Black's Law Dictionary*, 1242 (8th ed. 2004) (defining "proceeds" as "the value or land, goods or investments when converted into money" or "the amount of money received from a sale").

The district court's initial impression was correct – the intangible right to honest services is not a monetary interest capable of being laundered. The district court changed its position, and the Seventh Circuit affirmed, on grounds that an honest services fraud scheme can produce "proceeds." *Boscarino*, 437 F.3d at 636; Tr. 1532-33; App. A-4. That begs the question. The money laundering statute outlaws certain "monetary transactions" committed with "criminally derived property" – it is not enough that some monetary loss be a byproduct. *Cf. United States v. Walters*,

997 F.2d 1219, 1227 (7th Cir. 1993) ("A deprivation is a necessary but not a sufficient condition of mail fraud. Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement."); *United States v. Mandel*, 862 F.2d 1067, 1072 (4th Cir. 1988) ("*McNally* does not allow a mail fraud conviction merely on the finding that those charged received *any* property in connection with the scheme; *McNally* requires a finding that the scheme *defrauded* or *intended to defraud* someone of money or property.") (emphasis original).

Money laundering allegations have become prevalent in today's society. *See, e.g.*, DeLay Is Indicted Again in Texas; Money Laundering Is Charge, NY Times.com (October 4, 2005). Because money laundering depends upon a predicate crime, money laundering prosecutions cover a wide spectrum of activity – from drug trafficking to political corruption. The rule of law in this country, however, requires that criminal statutes be interpreted according to their terms and in a manner to provide fair notice. Here, the lower court decision has upheld a money laundering prosecution based upon a statute that Congress has not included as a money laundering predicate offense. Certiorari should be granted to prevent further unwarranted expansion of the money laundering statutes.

II. THE APPLICABLE SENTENCING STATUTE DOES NOT MAKE THE UNITED STATES SENTENCING GUIDELINES PRESUMPTIVELY REASONABLE AND PETITIONER'S SENTENCE WAS UNDULY DISPARATE WHEN COMPARED TO THE SENTENCE IMPOSED ON HIS CO-DEFENDANT

The remedial opinion in *United States v. Booker*, 543 U.S. 220 (2005) (Breyer, J.), held that a court of appeals

must review a sentence for reasonableness. The Seventh Circuit has said that a properly calculated guidelines sentence is presumed reasonable, subject to rebuttal by a defendant with factors in 18 U.S.C. § 3553(a). *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).[4] Other circuits have employed similar language. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 518 n.2 (1st Cir. 2006) (en banc) (citing cases).

The circuits, however, have split on the issue of whether a sentence within the guidelines range must be presumed reasonable.[5] In *Jimenez-Beltre*, the First Circuit held that it is not "helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable.'" *Id.* at 518. The court further observed that "[a]lthough making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction; and anyway terms like 'presumptive' and 'per se' are more ambiguous labels than they at first appear." *Id.* Citing language from the remedial opinion in *Booker*, the court held that the guidelines sentencing range should be considered by a district judge, and that

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[4] This presumption originated in *Mykytiuk*, and has been applied in a series of Seventh Circuit cases. *See, e.g., United States v. Owens*, 441 F.3d 486, 490 (7th Cir. 2006); *United States v. Ellis*, 440 F.3d 434, 438 (7th Cir. 2006); *United States v. Williams*, 436 F.3d 767, 768 (7th Cir. 2006).

[5] Prior to the circuit split identified above, district courts had divided on the role of the guidelines post-*Booker*. *Compare United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (guidelines should be varied from only "in unusual cases for clearly identified and persuasive reasons"), *with United States v. Ranum*, 353 F. Supp.2d 984, 985 (E.D. Wis. 2005) (guidelines should be treated as merely one factor in determining a reasonable sentence).

the district court's reasons for a sentence should be reviewed for reasonableness. *Id.*

The Seventh Circuit's current thinking is not supported in law. Nothing in the applicable sentencing statute, 18 U.S.C. § 3553(a), states that the guidelines are entitled to a presumption of reasonableness. Nothing in § 3553(a) states that the guidelines are to be accorded more weight than the other statutory factors. Furthermore, the *Booker* remedial opinion did not attach a presumption of reasonableness to a sentence within the guidelines range. Dissenting opinions in *Booker* also did not suggest that the remedial opinion should be read as attaching a presumption of reasonableness to sentences within the guidelines range. *See Booker*, 543 U.S. at 300 (Stevens, J., dissenting) ("judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C.A. § 3553(a)"); *Booker*, 543 U.S. at 305 (Scalia, J., dissenting) ("the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range").

This Court has not addressed whether the guidelines should be presumed reasonable in *Booker's* aftermath. This case provides an opportunity to address the issue. The issue is important given the frequency of sentencing-related appeals, and the circuit split identified above.

With respect to the petitioner's disparity argument, the Seventh Circuit addressed it without discussing the entirety of the applicable statutory language. Section

3553(a)(6) provides that a sentence must "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Standards referenced in § 3553(a)(6) include "similar records" and "similar conduct." The Seventh Circuit, however, effectively incorporated an additional standard into the statute, i.e., an exemption of using a cooperating witness' sentence as a basis for a disparity comparison. Because § 3553(a)(6) does not create such an exception, the court should not have employed it to reject the petitioner's disparity argument.

There is, in fact, unwarranted disparity between the sentences of the petitioner and Aulenta. While Aulenta was the principal in the scheme, and committed substantial criminal conduct in addition to the offenses charged in the indictment, he received 16 months less prison time than the petitioner – a 53-year-old, first-time offender, who did not owe a fiduciary duty to ABI/Acordia, or testify at trial. The sentencing disparity between Boscarino and Aulenta is unwarranted and defeats the goal of uniformity in sentencing. *See United States v. McGee*, 408 F.3d 966, 988 (7th Cir. 2005) ("King maintains that other defendants with similar roles in the conspiracy fared better with their ultimate sentences than he did, undercutting the guidelines' goal of uniformity in sentencing. This is a credible argument . . . ").

III. UNDER THE MANDATORY VICTIMS RESTITUTION ACT, RESTITUTION CANNOT BE ORDERED TO AN ENTITY THAT DID NOT SUSTAIN PECUNIARY LOSS AS A RESULT OF THE OFFENSE

In 1996, Congress enacted the Mandatory Victims Restitution Act ("MVRA"). Pub.L. 103-132, Title II, subtitle A, 110 Stat. 1227 (1996) (codified as 18 U.S.C. § 3663A,

3613A). As the name of the Act implies, the issue of restitution frequently arises in the federal courts in that restitution orders, with few exceptions, are mandatory in criminal cases in which the victim incurred a pecuniary loss.

The MVRA, however, limits the class of potential restitution payees. Specifically, the MVRA provides that the court shall order restitution for specified offenses that result in "an identifiable victim . . . [who] has suffered . . . pecuniary loss." 18 U.S.C. § 3663A(a)(1) and (c)(1)(B) (2003). The MVRA defines the word "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered" or "in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2).

Under Illinois law, an insurance brokerage has no right to fees not disclosed to the customer. 215 ILCS 5/507.1. Here, it is undisputed that ABI/Acordia did not disclose overcharges to Rosemont. The overcharges included the referral fees, as well as additional funds ($225,081 between 1992 and 1996). PSR, Deft's Version. The undisclosed fees were charged with the knowledge of ABI/Acordia employees in addition to Aulenta. Tr. 334-35, 344-63, 371-73.

Although Rosemont is the entity that sustained the pecuniary loss as a result of the ABI/Acordia overcharges, the indictment did not name Rosemont as a victim. R. 23. Consequently, the district court did not, and could not, order the payment of restitution to Rosemont. *Cf. Hughey v. United States*, 495 U.S. 411 (1990). The district court,

however, ordered the petitioner to pay restitution to ABI/Acordia. 5/18/05 Tr. 54; R. 258. The Seventh Circuit affirmed the restitution order. *Boscarino*, 437 F.3d at 637; App. A-5.

The restitution order here is legally erroneous. Stated simply, ABI/Acordia cannot be classified as a "victim" that incurred a "pecuniary loss" as a result of the money laundering offenses. ABI/Acordia had no right to any undisclosed fees in the first place. What ABI/Acordia may have lost was Aulenta's honest services. But that is an intangible right that cannot be recouped through a restitution order.

In its opinion, the Seventh Circuit did not address statutory language that requires a restitution payee to have suffered a "pecuniary loss." Rather, the court cited obscure cases that did not deal with the MVRA. As this Court's decision in *Hughey* makes clear, however, federal restitution awards must have a statutory basis.

Moreover, it is abundantly clear that ABI/Acordia did not have clean hands in brokering insurance to Rosemont. Yet, by the restitution order here, it will reap a financial windfall. It is unseemly to have federal courts participate in the award of restitution under such circumstances. *See United States v. Shepard*, 269 F.3d 884, 887 (7th Cir. 2001) (tortfeasor not entitled to restitution); *United States v. Martinez*, 978 F. Supp. 1442 (D. N.M. 1997) (finding it absurd to order restitution to an illegal casino that was a robbery victim); *see also United States v. Randle*, 324 F.3d 550, 557 n.4 (7th Cir. 2003) (questioning, without deciding, whether a fraud beneficiary could be awarded restitution).

As a matter of statutory interpretation, the restitution to ABI/Acordia was inappropriate. In light of the frequency

in which restitution and loss issues arise in the lower federal courts, the issue presented herein is important and worthy of review.

CONCLUSION

WHEREFORE, Petitioner Nick S. Boscarino respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to vacate or review the judgment of the Seventh Circuit, remand for further consideration and/or grant any other appropriate relief.

Respectfully submitted,

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Attorney for Petitioner
Nick S. Boscarino

APPENDIX A

437 F.3d 634

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Nick S. BOSCARINO, Defendant-Appellant.

No. 05-2657.

Argued Jan. 19, 2006.
Decided Feb. 8, 2006.

Stephen D. Anderson (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Marc W. Martin (argued), Chicago, IL, for Defendant-Appellant.

Before EASTERBROOK, MANION, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

A jury concluded that an insurance agency overcharged the City of Rosemont for its services and kicked back part of the excess to Nick Boscarino, who helped the agency secure the business. Boscarino also helped Ralph Aulenta, one of the agency's managers, hide money that Aulenta had taken from the till. To top it off, Boscarino failed to report as income much of the ill-gotten gains and committed other tax offenses. Aulenta pleaded guilty and testified against Boscarino, who was convicted of mail fraud, money laundering, and tax crimes. His sentence is 36 months' imprisonment, 24 months' supervised release, a $55,000 fine, restitution of $288,670, special assessments of $1,700, and the costs of prosecution, which the judge set at $4,692 – for

Boscarino is the rare criminal defendant who has legitimate assets sufficient to cover all of these monetary exactions.

Boscarino's appellate lawyer has pursued almost every contention that trial counsel raised and lost. The result is that none of the issues has been developed in depth, and strong contentions (if any) have been buried under anemic ones. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). We discuss only three of the contentions; the rest have been considered but are too feeble to call for exposition.

Every year that Rosemont placed its insurance through a brokerage that the parties call ABI/Acordia, Aulenta caused the firm to write a check to a corporation that Boscarino controlled. Though the money supposedly was a referral fee to compensate Boscarino for his assistance in persuading Rosemont to give ABI/Acordia the business, the check was never made out to Boscarino. He did not deposit the funds into the corporate accounts; instead he endorsed the checks to Aulenta, who returned half of the amount in monthly dollops over the coming year and kept the rest. The prosecution's theory was that Aulenta was stealing money from ABI/Acordia and sharing half of the takings with Boscarino, in part for his assistance in disguising the transaction; the brokerage did not miss the money because Aulenta simultaneously was overbilling Rosemont, so that ABI/Acordia's books balanced. A jury was entitled to find that Boscarino, who has considerable experience in business, recognized that these transactions had the hallmarks of fraud rather than

above-board referral fees. Corporate insiders don't keep half of bona fide referral fees, nor are such fees paid from an insider's personal account after such a roundabout transaction.

Because many of the payments passed through the mails, the indictment included a charge of mail fraud. 18 U.S.C. § 1341. And because Aulenta owed ABI/Acordia a fiduciary duty of loyalty, the indictment alleged that one aspect of the scheme was to defraud ABI/Acordia of Aulenta's honest services. 18 U.S.C. § 1346. This sets up Boscarino's challenge to his conviction for money laundering, in violation of 18 U.S.C. § 1956. Section 1956 makes it a crime to engage in financial transactions with the proceeds of "specified unlawful activity." That phrase, a defined term, includes "any act or activity constituting an offense listed in section 1961(1) of this title". 18 U.S.C. § 1956(c)(7)(A). Section 1961(1) in turn refers to mail fraud, in violation of § 1341, but does not mention § 1346. Because the mail fraud charge in this case included a reference to § 1346, Boscarino contends, it cannot serve as a predicate offense for money laundering – at least not unless the jury was instructed to disregard the honest-services aspect of the scheme, and his jury was not so instructed.

Whether a mail-fraud scheme that was carried out, in part, by depriving one person of another's honest services may be a predicate offense for a money-laundering conviction is a question of first impression among the courts of appeals. But the answer is not difficult. Section 1346 does not create a separate crime. It is a definitional clause, reading in full: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

The scheme to defraud itself violates § 1341, which is a listed predicate offense for the money-laundering statute.

Boscarino observes that only "proceeds" can be laundered, and depriving one's employer of honest services need not yield "proceeds." That's true enough, but when the offense *does* create proceeds, which are laundered to hide detection, it is sensible to treat them the same as any other proceeds of mail or wire fraud. Consider, for example, the bribery of public officials, as in *United States v. Murphy*, 768 F.2d 1518 (7th Cir.1985). Judge Murphy took money from litigants in cases over which he presided. Doing this deprived the public of his honest services. He did not take money from the public coffers, but the bribes were "proceeds" of the scheme to defraud, and if he had engaged in financial transactions with these proceeds Judge Murphy could have been convicted of money laundering as well as the scheme to defraud the public. Just so here. Aulenta deprived ABI/Acordia of both his honest services and the firm's money; the cash, which he shared with Boscarino, was "proceeds" that the two could (and did) launder to disguise the money's origin.

Boscarino's jury was instructed that it could convict him of the § 1956 charge only if it found that he engaged in financial transactions with the "proceeds" of a fraud. There is no chance that the jury thought that Boscarino laundered Aulenta's chicanery. One launders money (or clothes) but not "services," honest or otherwise. Anyway, Boscarino did not ask for an instruction that would have made it pellucid that "proceeds" means money and other things of value to third parties, rather than Aulenta's duty of loyalty.

Restitution is the second subject we must cover. The district court ordered Boscarino to repay ABI/Acordia what Aulenta had extracted during the scheme. That's inappropriate, Boscarino contends, because Rosemont rather than ABI/Acordia is the victim; after all, Aulenta obtained that money for the brokerage in the first place by bilking the City. One response is that even a thief can be the victim of a crime. See, e.g., *Levin v. United States*, 338 F.2d 265 (D.C.Cir.1965). ABI/Acordia was not entitled to this money *vis-à-vis* Rosemont, but it has rights superior to those of Aulenta and Boscarino. See, e.g., *Anderson v. Gouldberg*, 51 Minn. 294, 296, 53 N.W. 636, 637 (1892); *Ward v. People*, 3 Hill 395 (N.Y.1842). Another, and more functional, response is that ABI/Acordia is just a way station for the funds. Once Boscarino reimburses the immediate victim, ABI/Acordia will be able to repay Rosemont. Instead of determining the ultimate incidence of costs created by criminal activity, judges should direct restitution to the immediate victim; other persons' rights in the funds then may be sorted out under normal rules of contract and property law. See *United States v. Shepard*, 269 F.3d 884, 886-87 (7th Cir.2002).

Finally, we consider Boscarino's contention that his sentence is unreasonably high. Thirty-six months falls within a properly constructed range under the Sentencing Guidelines. (For the loss involved, the range is 33 to 41 months.) Instead of comparing his sentence to the range, however, Boscarino wants us to compare it to Aulenta's sentence. Had Aulenta not pleaded guilty, his range would have been 41-51 months. His guilty plea cut the range to 30-37 months. Because Aulenta assisted the prosecution by testifying against Boscarino, the United States proposed a reduction under U.S.S.G. § 5K1.1, and Aulenta's

actual sentence was 20 months. District judges are supposed to reduce disparity in sentencing, see 18 U.S.C. § 3553(a)(6), and Boscarino contends that it is unacceptably disparate to give the lower sentence to the more culpable offender.

Until recently we refused to address arguments by criminal defendants who sought below-Guideline sentences, at least when district judges recognized their authority to depart. See *United States v. Franz*, 886 F.2d 973 (7th Cir.1989). *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which abolished "departures" by making the Guidelines advisory, abolished this rule too. See *United States v. Vaughn*, 433 F.3d 917 (7th Cir.2006); *United States v. Arnaout*, 431 F.3d 994 (7th Cir.2005). We held in *Franz* that a request for a below-guideline sentence did not fit any of the categories in 18 U.S.C. § 3742(a), which authorizes appellate review of sentences at defendants' behest. After *Booker*, however, an "unreasonable" sentence is an unlawful sentence, and § 3742(a)(1) authorizes the correction of any illegal sentence. Because sentences within the Guideline range are presumptively but not conclusively reasonable, we are authorized to entertain contentions that a particular Guideline sentence is unreasonably high.

This is as far as Boscarino gets, however. His argument misunderstands what § 3553(a)(6) means when saying that district judges must consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct". Boscarino and Aulenta had similarly clean records before these convictions, and they engaged in similar conduct, but a sentencing *difference* is not a forbidden "disparity" if it is justified by legitimate considerations, such as

rewards for cooperation. Indeed, before *Booker* a district judge was *forbidden* to reduce one defendant's sentence because of a discount properly given to another. See *United States v. Meza*, 127 F.3d 545 (7th Cir.1997). See also, e.g., *United States v. Joyner*, 924 F.2d 454 (2d Cir.1991). The norms of sentencing are no longer so unyielding; *Booker* turns rules into standards, and the rule of *Meza* is one of those that have been transfigured. See *United States v. Newsom*, 428 F.3d 685, 688-89 (7th Cir.2005).

Still, *Booker* is about the allocation of fact-finding authority between judge and jury, and about the burden of persuasion. It does not change rules of law. See, e.g., *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir.2005); *United States v. Rivera*, 411 F.3d 864, 866-67 (7th Cir.2005); *United States v. Lee*, 399 F.3d 864, 866 (7th Cir.2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir.2005). A reason bad before *Booker* (e.g., alienage, race, sex) is bad today. One rule of law that preceded *Booker*, and retains vitality after it, is that a sentencing difference based on one culprit's assistance to the prosecution is legally appropriate.

There would be considerably less cooperation – and thus more crime – if those who assist prosecutors could not receive lower sentences compared to those who fight to the last. Neither *Booker* nor § 3553(a)(6) removes the incentive for cooperation – and because this incentive takes the form of a lower sentence for a cooperator than for an otherwise-identical defendant who does not cooperate, the reduction cannot be illegitimate. After all, § 3553(a)(6) disallows "*unwarranted* sentence disparities" (emphasis added), not all sentence differences.

Another way to put this point is to observe that the kind of "disparity" with which § 3553(a)(6) is concerned is an unjustified difference across judges (or districts) rather than among defendants to a single case. If the national norm for first offenders who gain $275,000 or so by fraud is a sentence in the range of 33 to 41 months, then system-wide sentencing disparity will *increase* if Boscarino's sentence is reduced so that it comes closer to Aulenta's. Instead of one low sentence, there will be two low sentences. But why should one culprit receive a lower sentence than some otherwise-similar offender, just because the first is "lucky" enough to have a confederate turn state's evidence? Yet that is Boscarino's position, which has neither law nor logic to commend it.

Sentencing disparities are at their ebb when the Guidelines are followed, for the ranges are themselves designed to treat similar offenders similarly. That was the main goal of the Sentencing Reform Act. The more out-of-range sentences that judges impose after *Booker*, the more disparity there will be. A sentence within a properly ascertained range therefore cannot be treated as unreasonable by reference to § 3553(a)(6).

AFFIRMED

APPENDIX B

(Rev. 03/05)

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
	)	**Case Number: 02-CR-86-1**
v.	)	**Judge: John F. Grady**
Nick S. Boscarino	)	

Patrick Cotter, Defendant's Attorney
Stephen Andersson, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Jul. 29, 2005)

THERE WAS A:

jury verdict of guilty as to count(s) 2-4, 6, 8, 10-11, 13, 15-16, 18-20, and 22-25 of the superseding indictment.

Count(s) 1,5,7,9 and 14 are dismissed on the oral motion of the United States.

The remaining Count(s) is/are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. Sec. 1956(h)	Conspiracy to commit money laundering	January, 1997	2

18 U.S.C. Sec. 1956(a)(1)	Engaging in monetary transactions over $10,000 with criminally derived proceeds	January, 1997	3-4, 6, 8, 10-11, 13 and 15
18 U.S.C. Sec. 371	Conspiracy to defraud the United States of Tax Revenue and obstruct the due operation of the IRS	2000	16
26 U.S.C. Sec. 7206(1)	Filing a false tax return	August, 2000	18-20 and 22-25

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **thirty-six (36) months.**

As to Count 2-4, 6, 8, 10, 11, 13, 15 and 16, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **36 months.** As to Count 18-20, 22-25, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **36 months.** Said imprisonment terms to run concurrent for a total of thirty-six (36) months.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

> The defendant is sentenced on counts 2-4, 6, 8, 10, 13, 15 and 16 to a period of 2 years of supervised release and on counts 18, 19, 20, 22-25 to a period of 1 year of supervised release, to run concurrently for a total supervised release period of 2 years.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$1700.00	**$55,000.00**	**$288,670.00**	**$4,692.18**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $288,670.00

Joint and several for the full amount of restitution with co-defendant(s).

Co-Defendant's Name	Case Number	Joint and Several Amount
Ralph Aulenta	02 CR 86-2	$288,670.00

The interest requirement on fine(s) is waived.

FORFEITURE

Forfeiture is ordered as provided in the attached preliminary order of forfeiture.

Date of Imposition of Judgment/Sentencing: May 18, 2005

/s/ John F. Grady
JOHN F. GRADY
UNITED STATES
DISTRICT JUDGE

Dated at Chicago, Illinois
this 25th day of May, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 02CR0086
v.	)	Judge John F. Grady
Nick S. Boscarino	)	

PRELIMINARY ORDER OF FORFEITURE

(Filed Mar. 3, 2004)

(Filed Jul. 29, 2005)

This cause comes before the Court on motion of the United States for entry of a preliminary order of forfeiture as to specific property pursuant to the provisions of Title 18, United States Code, Section 982(a)(1), and the Court being fully informed hereby:

(a) On September 19, 2002, a superseding indictment was returned charging defendant NICK S. BOSCARINO and others with money laundering offenses pursuant to the provisions of Title 18, United States Code, Sections 1956 and 1957, among other violations;

(b) The indictment sought forfeiture to the United States of specific property pursuant to the provisions of 18 U.S.C. § 982(a)(1), including fund in the amount of 462,765;

(c) Beginning on January 29, 2004, a jury trial was held before this Court;

(d) On February 17, 2004, the jury returned a verdict of guilty against defendant NICK S. BOSCARINO on certain counts of the indictment, including Counts Two,

Three, Four, Six, Eight, Ten, Eleven, Thirteen, and Fifteen, thereby making the property named in the indictment subject to forfeiture pursuant to 18 U.S.C. § 982(a)(1);

(e) Defendant NICK S. BOSCARINO waived his right to have the forfeiture allegations in the indictment considered by the jury and agreed to an order of forfeiture in the amount of $288,670;

(f) As a result of his conviction of violations of 18 U.S.C. §§ 1956 and 1957, defendant NICK S. BOSCARINO agreed to the entry of a preliminary order of forfeiture relinquishing any right, title, or ownership interest he has in funds in the amount of $288,670, pursuant to 18 U.S.C. § 982(a)(1);

(g) As funds in the amount of $288,670 are subject to forfeiture, the government requests that this Court enter a preliminary order of forfeiture, pursuant to 18 U.S.C. § 982(a)(1), forfeiting all right, title, and interest of NICK S. BOSCARINO in the foregoing funds for disposition according to law;

(h) If any of the funds in the amount of the $288,670 money judgment entered against defendant NICK S. BOSCARINO, as a result of any act or omission of the defendant:

1. cannot be located upon the exercise of due diligence;

2. has been transferred or sold to, or deposited with, a third party;

3. has been placed beyond the jurisdiction of the Court;

4. has been substantially diminished in value, or

5. has been commingled with other property which cannot be divided without difficulty;

the United States shall request that this Court order the forfeiture of any other property belonging to defendant NICK S. BOSCARINO up to the value of the $288,670 money judgment entered against the defendant pursuant to 21 U.S.C. § 853(p), as incorporated by 21 U.S.C. § 982(b)(1) and Fed. R. Crim. P. 32.2, in order to satisfy the money judgment entered by the Court.

(i) Pursuant to the provisions of 18 U.S.C. § 982(a)(1) and Fed. R. Crim. P. 32.2, the United Sates [sic] seeks forfeiture of all right, title, and interest that defendant NICK S. BOSCARINO may have in funds in the amount of $288,670, so the funds may be disposed of according to law;

(j) The United States requests that the terms and conditions of this preliminary order of forfeiture entered by the Court be made part of the sentence imposed against defendant NICK S. BOSCARINO and included in any judgment and commitment order entered in this case against him.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That, pursuant to the provisions of 18 U.S.C. § 981(a)(1) and Fed R. Crim P. 32.2, all right, title, and interest defendant NICK S. BOSCARINO may have in funds in the amount of $288,670 is hereby forfeited to the United States of America for disposition according to law;

2. That, by an act or omission on the part of defendant NICK S. BOSCARINO, funds in the amount of $288,670 cannot be located to satisfy the forfeiture judgment; pursuant to the provisions of 21 U.S.C. § 853(p), as incorporated by 21 U.S.C. § 982(b)(1), the United States has the authority to forfeit substitute assets in the amount of $288,670 to satisfy the money judgment entered by this Court;

3. That, should assets become available to satisfy the forfeiture judgment in the future, the United States shall at that time file a motion for substitution of assets before this Court requesting permission to seize such assets and publish notice of the United States' intent to forfeit the property in satisfaction of the forfeiture money judgment according to law;

4. That, the terms and conditions of this preliminary order of forfeiture are part of the sentence imposed against defendant NICK S. BOSCARINO and shall be made part of any judgment and commitment order entered in this case against him;

5. This court shall retain jurisdiction in this matter to take additional action and enter further orders as necessary to implement and enforce this forfeiture order.

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

DATED: MAR -3 2004

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

No. 05-1379

In the Supreme Court of the United States

NICK S. BOSCARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
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QUESTIONS PRESENTED

1. Whether a mail fraud scheme carried out by depriving one person of another's honest services may be a predicate offense for a money-laundering conviction.

2. Whether a federal court of appeals, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), should treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable.

3. Whether the district court's restitution order accords with the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 17

TABLE OF CONTENTS

Cases:

Cleveland v. *United States*, 531 U.S. 12 (2000) 7
Cunningham v. *California*, cert. granted, No. 05-6551 (Feb. 21, 2006) 12
People v. *Black*, 113 P.3d 534 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2006) .. 12, 13
McNally v. *United States*, 483 U.S. 350 (1987) 6, 7
United States v. *Alonzo*, 435 F.3d 551 (5th Cir. 2006) ... 10
United States v. *Booker*, 543 U.S. 220 (2005) 9, 13
United States v. *Castro-Juarez*, 425 F.3d 430 (7th Cir. 2005) 12
United States v. *Cooper*, 437 F.3d 324 (3d Cir. 2006) 11
United States v. *Duhon*, 440 F.3d 711 (5th Cir. 2006) ... 14
United States v. *Fernandez*:
443 F.3d 19 (2d Cir. 2006) 11
282 F.3d 500 (7th Cir.), cert. denied, 537 U.S. 1028 (2002) 7
United States v. *Hasner*, 340 F.3d 1261 (11th Cir. 2003), cert. denied, 543 U.S. 810 (2004) 7

Cases—Continued: Page

United States v. *Jiménez-Beltre*, 440 F.3d 514 (1st Cir. 2006) 11, 12
United States v. *Johnson*, 445 F.3d 339 (4th Cir. 2006) 10
United States v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984) 7
United States v. *Martinez*, 978 F. Supp. 1442 (D.N.M. 1997) 16
United States v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989) 9
United States v. *Mykytiuk*, 415 F.3d 606 (7th Cir. 2005) 10
United States v. *Nichols*, 376 F.3d 440 (5th Cir. 2004), cert. denied, 543 U.S. 1055 (2005) 14
United States v. *Pennington*, 168 F.3d 1060 (8th Cir. 1999) 7
United States v. *Randle*, 324 F.3d 550 (7th Cir. 2003) ... 16
United States v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004) 8
United States v. *Shepard*, 269 F.3d 884 (7th Cir. 2001) 16
United States v. *Smith*, 445 F.3d 1 (1st Cir. 2006) 14
United States v. *Talley*, 431 F.3d 784 (11th Cir. 2005) ... 11
United States v. *Terrell*, 445 F.3d 1261 (10th Cir. 2006) 10
United States v. *Tobacco*, 428 F.3d 1148 (8th Cir. 2005) 10
United States v. *Walters*, 997 F.2d 1219 (7th Cir. 1993) 9

Cases—Continued: Page

United States v. *Webb*, 403 F.3d 373 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) 12
United States v. *Williams*, 436 F.3d 706 (6th Cir. 2006) 10

Constitution, statutes, regulation and rules:

U.S. Const.:
Amend. VI 12
Amend. XIV 12
Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3551 *et seq.*:
18 U.S.C. 3553(a) (2000 & Supp. III 2003) 10, 13
18 U.S.C. 3553(a)(6) (2000 & Supp. III 2003) .. 13, 14
18 U.S.C. 3663A 15
18 U.S.C. 3663A(a)(2) 15
18 U.S.C. 3663A(c)(1)(A)(ii) 15
18 U.S.C. 3663A(c)(1)(B) 15
18 U.S.C. 371 1
18 U.S.C. 1341 (2000 & Supp. III 2003) 4, 6, 7
18 U.S.C. 1341 (1994) 7
18 U.S.C. 1343 (2000 & Supp. III 2003) 4, 6
18 U.S.C. 1346 ..... 4, 7, 8, 9
18 U.S.C. 1956 4
18 U.S.C. 1956 (2000 & Supp. III 2003) 6, 8
18 U.S.C. 1956(a)(1) 1
18 U.S.C. 1956(a)(1) (2000 & Supp. III 2003) 1
18 U.S.C. 1956(c)(7)(A) 4, 6, 8
18 U.S.C. 1956(h) 1

Statutes, regulation and rules: Page

18 U.S.C. 1957 6
18 U.S.C. 1957(f)(3) 6, 8
18 U.S.C. 1961(1) 4, 8
18 U.S.C. 1961(1) (2000 & Supp. III 2003) 6, 8
18 U.S.C. 3664(f)(1)(A) 15
26 U.S.C. 7206(1) 2
28 U.S.C. 994(n) 14
Cal. Penal Code § 1170(b) (West 2004) 13
United States Sentencing Guidelines § 5K1.1 5
Sup. Ct. R. 10 16
Cal. R. Ct. 4.420(b) (2006) 13

Miscellaneous:

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 16

In the Supreme Court of the United States

No. 05-1379

NICK S. BOSCARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 437 F.3d 634.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2006. The petition for a writ of certiorari was filed on April 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h); various instances of money laundering, in violation of 18 U.S.C. 1956(a)(1); conspiracy to defraud the United States by impeding the lawful functions of the Internal Revenue Service, in violation of 18 U.S.C. 371; and filing false tax returns, in

violation of 26 U.S.C. 7206(1). Pet. App. 9-10. He was sentenced to 36 months of imprisonment, to be followed by two years of supervised release, and fined $55,000. *Id.* at 10-11. Petitioner was also ordered to forfeit $288,670, to pay $288,670 in restitution, and to pay the costs of prosecution, set at $4692. *Id.* at 11-12, 14. The court of appeals affirmed. *Id.* at 1-8.

1. Petitioner was a managing officer and shareholder of several Illinois corporations. Ralph Aulenta was petitioner's friend and the president of ABI/Acordia, an insurance brokerage agency that handled insurance for petitioner's corporations. Petitioner helped Aulenta secure a contract for ABI/Acordia to handle insurance for the City of Rosemont (Rosemont), and Rosemont placed its insurance through ABI/Acordia from 1991 until 1997. During that period, ABI/Acordia overcharged Rosemont for its services and kicked back part of the excess to petitioner. Pet. App. 1-2; Gov't C.A. Br. 3-10.

During each of the years that ABI/Acordia had the Rosemont contract, Aulenta caused ABI/Acordia to write a check to one of petitioner's corporations. The check was drawn on ABI/Acordia's Premium Fund Trust Account, an escrow account into which insurance premiums from various insured parties, including Rosemont and others, were deposited for payment to insurance carriers. Although the money that Aulenta caused to be drawn on this account supposedly was a referral fee compensating petitioner for helping ABI/Acordia obtain the Rosemont contract, the checks were not made out to petitioner, and petitioner did not deposit the funds into a corporate account. Rather, petitioner endorsed the checks to Aulenta, who returned half the amount in monthly increments over the next year and kept the

rest. ABI/Acordia did not miss the money because Aulenta was overbilling Rosemont, so ABI/Acordia's books balanced. Petitioner failed to report as taxable income much of his ill-gotten gains. Pet. App. 1-2; Gov't C.A. Br. 3-18, 32.

2. Petitioner and Aulenta were indicted on charges of wire fraud, money laundering, conspiracy to commit money laundering, conspiracy to defraud the United States, and tax evasion. Pet. C.A. Supp. App. 1-54. The indictment alleged that Aulenta, as president of ABI/Acordia, owed that agency a fiduciary duty of loyalty and that one aspect of the fraudulent scheme was to deprive ABI/Acordia of Aulenta's honest services. Pet. App. 3; Pet. C.A. Supp. App. 2. The money laundering counts charged petitioner and Aulenta with engaging in financial transactions with the proceeds of their fraud on ABI/Acordia. Pet. App. 3; Pet. C.A. Supp. App. 11-31.

Aulenta pleaded guilty to money laundering and conspiracy to commit money laundering. He was sentenced to 20 months of imprisonment and ordered to pay restitution to ABI/Acordia. Pet. App. 5-6, 12; Gov't C.A. Br. 1-2.

Following a jury trial, petitioner was convicted of conspiracy to commit money laundering, various instances of money laundering, conspiracy to defraud the United States, and filing false tax returns. Pet. App. 9-10. Petitioner was sentenced to 36 months of imprisonment and ordered to pay various costs, fines, and restitution, including restitution to ABI/Acordia. *Id.* at 5, 10-11.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1-8. The court rejected petitioner's contention that a fraudulent scheme to deprive someone of another's honest services cannot serve

as the predicate offense for a money laundering conviction. *Id.* at 3-4. The court reasoned that the money laundering statute, 18 U.S.C. 1956, "makes it a crime to engage in financial transactions with the proceeds of 'specified unlawful activity.'" Pet. App. 3. Section 1956(c)(7)(A) defines the phrase "specified unlawful activity" to include "any act or activity constituting an offense listed in section 1961(1) of this title." The list of offenses in 18 U.S.C. 1961(1) includes mail fraud (18 U.S.C. 1341 (2000 & Supp. III 2003)) and wire fraud (18 U.S.C. 1343 (2000 & Supp. III 2003)). The court explained that, although the list in Section 1961(1) does not include 18 U.S.C. 1346, which defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services," that is immaterial: Section 1346 "does not create a separate crime" but merely defines the scope of the fraudulent schemes criminalized by Sections 1341 and 1343. Pet. App. 3. "The scheme to defraud itself violates § 1341, which is a listed predicate offense for the money-laundering statute." *Id.* at 4.

The court further rejected petitioner's argument that "honest services" mail or wire fraud cannot be a predicate offense for money laundering because it does not produce any "proceeds" that can be laundered. Pet. App. 4. The court agreed that there must be "proceeds" for there to be money laundering and that depriving one's employer of honest services "need not yield 'proceeds.'" *Ibid.* The court reasoned, however, that when the offense "*does* create proceeds, which are laundered to hide detection, it is sensible to treat them the same as any other proceeds of mail or wire fraud." *Ibid.* Here, the court concluded, "Aulenta deprived ABI/Acordia of both his honest services and the firm's money; the cash,

which he shared with [petitioner], was 'proceeds' that the two could (and did) launder to disguise the money's origin." *Ibid.*

The court was also unpersuaded by petitioner's contention that his sentence was unreasonably high as compared to the sentence received by Aulenta. Pet. App. 5-8. The court noted that petitioner's 36-month sentence fell within the range of 33 to 41 months recommended by the Sentencing Guidelines, and that "sentences within the Guideline range are presumptively but not conclusively reasonable." *Id.* at. 5-6. The court explained that Aulenta was sentenced to only 20 months of imprisonment because he received a reduction under Sentencing Guidelines § 5K1.1 for assisting the prosecution by testifying against petitioner. Pet. App. 5-6. The court concluded that the difference between Aulenta's sentence and petitioner's did not make petitioner's sentence unreasonable because "a sentencing *difference* is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation." *Id.* at 6-7.

The court also rejected petitioner's claim that the district court erred in ordering him to pay restitution to ABI/Acordia. Pet. App. 5. Petitioner argued that ABI/Acordia was not a victim entitled to restitution because it had no legal right to the money that it had overcharged Rosemont and those overcharges equaled or exceeded the amount by which it had been defrauded by petitioner and Aulenta. The court disagreed, reasoning that although ABI/Acordia "was not entitled to this money *vis-à-vis* Rosemont," it "ha[d] rights superior to those of Aulenta and [petitioner]." *Ibid.* The court further reasoned that "[o]nce [petitioner] reimburses [ABI/Acordia, it] will be able to repay Rosemont. Instead of determining the ultimate incidence of costs cre-

ated by criminal activity, judges should direct restitution to the immediate victim; other persons' rights in the funds then may be sorted out under normal rules of contract and property law." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-15) that a scheme to deprive someone of honest services cannot qualify as a predicate offense for a money laundering conviction. The court below correctly rejected that contention, and its ruling does not conflict with any decision of this Court or of any other court of appeals. This Court's review of the issue is therefore not warranted.

a. The money laundering statutes, 18 U.S.C. 1956 (2000 & Supp. III 2003) and 18 U.S.C. 1957, proscribe engaging in financial transactions with the proceeds of "specified unlawful activity." The statutes define the phrase "specified unlawful activity" to include "any act or activity constituting an offense listed in section 1961(1) of this title." 18 U.S.C. 1956(c)(7)(A), 1957(f)(3). The offenses listed in 18 U.S.C. 1961(1) (2000 & Supp. III 2003) include both mail fraud (18 U.S.C. 1341 (2000 & Supp. III 2003)) and wire fraud (18 U.S.C. 1343 (2000 & Supp. III 2003)). The mail and wire fraud statutes make it unlawful to use mail or wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." See 18 U.S.C. 1341 (2000 & Supp. III 2003); 18 U.S.C. 1343 (2000 & Supp. III 2003).

Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that those fraud statutes prohibited schemes to deprive the public of the intangible right to the honest

services of government officials. The courts of appeals also generally agreed that the covered intangible rights included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In *McNally*, this Court rejected the "intangible rights" theory and held that the mail fraud statute in its then-existing form reached only schemes that sought to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360. Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 declares that the term "scheme or artifice to defraud," as used in the mail and wire fraud statutes, includes "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

As the court of appeals here correctly concluded, Section 1346 does not create a separate offense but instead elaborates on the scope of the offenses delineated in the mail and wire fraud statutes. Pet. App. 3-4; see *United States* v. *Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (explaining that Section 1346 "defines 'scheme or artifice to defraud'") (quoting 18 U.S.C. 1341 (1994)), cert. denied, 543 U.S. 810 (2004); *United States* v. *Fernandez*, 282 F.3d 500, 506 n.3 (7th Cir.) (same), cert. denied, 537 U.S. 1028 (2002); *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (describing Section 1341 as the "operative offense-declaring statute"

and Section 1346 as "a definitional provision"). Section 1346 makes clear that the mail and wire fraud statutes prohibit a "scheme or artifice to defraud" that deprives someone of the right to honest services. See 18 U.S.C. 1346. The money laundering statutes list mail and wire fraud as predicate offenses. 18 U.S.C. 1956(c)(7)(A), 1957(f)(3); see 18 U.S.C. 1961(1) (2000 & Supp. III 2003). Therefore, mail and wire frauds that are carried out by depriving someone of honest services are predicate offenses for money laundering.

b. Petitioner cites (Pet. 12-13) various cases that stand for the uncontested proposition that only offenses listed in 18 U.S.C. 1961(1) (such as mail and wire fraud) may serve as predicate offenses for the money laundering and RICO statutes. But, as explained above, that proposition is fully consistent with the court of appeals' conclusion that "honest services" mail and wire frauds may serve as predicate offenses for money laundering. Petitioner cites no case, and we are aware of none, that holds to the contrary.

Petitioner argues that "honest services" mail or wire fraud cannot be the basis for a money laundering conviction because "'honest services' cannot constitute 'money,' 'property' or 'proceeds' capable of being laundered in a financial transaction." Pet. 13. As the court of appeals explained, that argument is incorrect. See Pet. App. 4. It is true that money laundering must involve "proceeds" from a predicate offense. See 18 U.S.C. 1956 (2000 & Supp. III 2003), 1957. And it is also true that "honest services" mail or wire fraud is illegal whether or not it causes economic or pecuniary harm to the victim. See, *e.g.*, *United States* v. *Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004). But "honest services" mail and wire frauds frequently do cause a

pecuniary loss to the victims and generate proceeds for the perpetrators. As the court of appeals aptly observed, "when the offense *does* create proceeds, which are laundered to hide detection," there is no reason to treat them differently from "any other proceeds of mail or wire fraud." Pet. App. 4.

In this case, petitioner's deprivation of honest services did generate proceeds. His fraudulent scheme deprived ABI/Acordia not only of Aulenta's honest services but also of money—the cash that Aulenta shared with petitioner. As the indictment charged, "[i]t was part of the scheme that [petitioner] used his position as an officer of [one of his corporations] and [Aulenta] used his position as president of ABI/Acordia of Illinois to defraud ABI/Acordia of approximately $288,670 through sham transactions." Pet. C.A. Supp. App. 2. The court of appeals correctly concluded that the $288,670 "was 'proceeds' that the two could (and did) launder to disguise the money's origin." Pet. App. 4.[1]

2. Petitioner also argues (Pet. 15-18) that, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable, and that he was entitled to a reduction in his sentence in order to avoid a sentencing disparity with co-conspirator Aulenta. The court of appeals correctly concluded otherwise, and this Court's review of that conclusion is not warranted.

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[1] Petitioner's reliance (Pet. 14-15) on *United States* v. *Walters*, 997 F.2d 1219 (7th Cir. 1993), and *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989), is misplaced. Neither of those decisions involved the scope of the money laundering statutes and both of the decisions predated the enactment of Section 1346.

a. Since *Booker*, several courts of appeals have held that a sentence within a properly calculated Guidelines range is "presumptively reasonable" on appellate review. See, *e.g.*, *United States* v. *Terrell*, 445 F.3d 1261, 1264-1265 (10th Cir. 2006); *United States* v. *Johnson*, 445 F.3d 339, 341-344 (4th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Those courts have relied on a variety of reasons, including that the Guidelines (1) incorporate the factors that 18 U.S.C. 3553(a) (2000 & Supp. III 2003) commands district courts to consider when imposing sentence, see, *e.g.*, *Terrell*, 445 F.3d at 1265 (noting that "the Guidelines are generally an accurate application of the factors listed in § 3553(a)"); (2) are the product of extensive study and revision, reflecting the considered judgment of experts, Congress, and sentencing judges across the country, see, *e.g.*, *Mykytiuk*, 415 F.3d at 607 ("The Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses."); and (3) yield sentences that are based on comprehensive, individualized fact-finding, see, *e.g.*, *Johnson*, 445 F.3d at 343-344 (observing that fact-finding under the Guidelines is "individualized," "extensive," and "designed to give the sentencing court a comprehensive overview of the defendant").

b. Although the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a Guidelines sentence is presumptively reasonable on appellate review, the First, Second, Third, and Eleventh Circuits have not. Petitioner contends (Pet. 16-17) that this

Court should grant review to resolve that disagreement, but there is no present need for the Court to resolve any tension that may exist among the courts of appeals on the issue.

First, it is far from clear that the standards employed by the First, Second, Third, and Eleventh Circuits are materially different from a presumption of reasonableness, such that there will be different results in cases with similarly situated defendants. The Eleventh Circuit has said that a Guidelines sentence is "ordinarily" reasonable, *United States* v. *Talley*, 431 F.3d 784, 788 (2005); the Third Circuit has said that a sentence within the Guidelines range is "more likely" to be reasonable than a sentence outside the range, *United States* v. *Cooper*, 437 F.3d 324, 332 (2006); the Second Circuit has said that a Guidelines sentence will be reasonable "in the overwhelming majority of cases," *United States* v. *Fernandez*, 443 F.3d 19, 27 (2006); and the First Circuit has said that the Guidelines "continue * * * to be an important consideration * * * on appeal," *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (2006) (en banc). In each of those cases, moreover, the court of appeals found that the Guidelines sentence at issue was reasonable. See *Fernandez*, 443 F.3d at 34; *Jiménez-Beltre*, 440 F.3d at 519-520; *Cooper*, 437 F.3d at 332; *Talley*, 431 F.3d at 788. Whatever the differences in terminology, therefore, there is universal agreement that a sentence within a properly calculated Guidelines range will usually be reasonable.

Second, *Booker* has been the law for only 18 months, and the courts of appeals are just beginning to evaluate post-*Booker* sentences. Accordingly, even if there were material differences in the standards applied by the courts of appeals in reviewing sentences for unreason-

ableness, it would be premature for this Court to address the issue. The lower courts are still in the early stages of developing and refining the standards governing the imposition and review of post-*Booker* sentences and, as those courts themselves recognize, those standards are continuing to evolve. See, *e.g.*, *Jiménez-Beltre*, 440 F.3d at 521 (Torruella, J., concurring) ("As the case law develops, the standards we announce today will evolve."); *United States* v. *Castro-Juarez*, 425 F.3d 430, 431 (7th Cir. 2005) (evaluation of the "reasonableness" of a sentence is "a process that continues to evolve in our decisions applying *Booker*"); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) (the meaning of reasonableness and the procedures to be employed by the courts will "evolve on a case-by-case basis").

c. On February 21, 2006, this Court granted a writ of certiorari in *Cunningham* v. *California*, No. 05-6551, to decide whether California's Determinate Sentencing Law violates the Sixth and Fourteenth Amendments by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant. The petition in this case need not be held pending the disposition of *Cunningham*, however, because the federal Guidelines system is unlike the California sentencing scheme at issue in that case.

Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower term, a middle term, and an upper term. See *People* v. *Black*, 113 P.3d 534, 538 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2005). California's Determinate Sentencing Law provides that "the court shall order imposition of the middle

term, unless there are circumstances in aggravation or mitigation of the crime," Cal. Penal Code § 1170(b) (West 2004), and a rule issued under the law provides that a court may impose the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b) (2006). Aggravating and mitigating circumstances may be established by a preponderance of the evidence, *ibid.*, and, in determining the "relevant facts," the court may consider "the record in the case, the probation officer's report, other reports including * * * statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, * * * and any further evidence introduced at the sentencing hearing," Cal. Penal Code § 1170(b) (West 2004).

Unlike the California law, which is "worded in mandatory language," *Black*, 113 P.3d at 544, the federal sentencing system, as modified by *Booker*, is not a determinate sentencing law. The federal Guidelines are "effectively advisory," *Booker*, 543 U.S. at 245, and federal sentences are ultimately based on the factors in 18 U.S.C. 3553(a) (2000 & Supp. III 2003).

d. Petitioner's claim that his particular sentence was unreasonable (Pet. 17-18) also does not warrant this Court's review. The court of appeals correctly rejected petitioner's contention that there was an unwarranted disparity between his 36-month sentence and the 20-month sentence received by his co-conspirator Aulenta. See Pet. App. 5-8. Section 3553(a)(6) requires that sentencing courts consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). But, as the court of appeals ex-

plained, a difference in sentences is not an "unwarranted" disparity if it "is justified by legitimate considerations, such as rewards for cooperation." Pet. App. 6-7. Aulenta's sentence was justifiably lower than petitioner's because Aulenta cooperated with the government by testifying against petitioner. *Ibid.* Petitioner did not provide any comparable assistance. Moreover, the proper basis for assessing whether there is unwarranted disparity under Section 3553(a)(6) is by comparisons not to the sentence imposed on a co-defendant in a particular case but to the class of similarly situated offenders nationwide. See *United States* v. *Smith*, 445 F.3d 1, 5 (1st Cir. 2006) ("Congress' goal of equality primarily envisions a national norm.").

Congress expressly contemplated that defendants would receive different sentences based on differences in the extent to which they cooperate with law enforcement. See 28 U.S.C. 994(n) (directing that the Sentencing Commission "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"). See *United States* v. *Duhon*, 440 F.3d 711, 720 (5th Cir. 2006) ("sentencing disparity produced by substantial assistance departures was intended by Congress and is thus not a proper sentencing consideration under section 3553(a)(6)"); *United States* v. *Nichols*, 376 F.3d 440, 443 (5th Cir. 2004) (disparities based on substantial assistance are justified), cert. denied, 543 U.S. 1055 (2005).

3. Petitioner also contends (Pet. 18-21) that the district court erred in ordering him to pay restitution be-

cause ABI/Acordia, the direct victim of his fraud, obtained the money that he stole from it by overcharging the City of Rosemont for its services. The court below correctly rejected that contention, and further review is not warranted.

The Mandatory Victims Restitution Act of 1996 (MVRA) requires that the district court, as part of the sentence for specified offenses, "order restitution * * * in the full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), for any "offense against property * * * in which an identifiable victim or victims has suffered a * * * pecuniary loss," 18 U.S.C. 3663A(c)(1)(A)(ii) and (B). The MVRA defines "victim" to include those "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663A(a)(2).

As part of petitioner's and Aulenta's fraudulent scheme, Aulenta caused ABI/Acordia to make payments from its Premium Fund Trust Account to Aulenta, petitioner, and various companies owned by petitioner—payments that Aulenta was not authorized to make. As a result, ABI/Acordia suffered a direct loss of $288,670, the amount of those unauthorized payments. Pet. App. 1. ABI/Acordia therefore suffered a "pecuniary loss" and is a "victim" entitled to restitution under the MVRA.

Petitioner contends that ABI/Acordia did not suffer a pecuniary loss because it obtained as much money as petitioner and Aulenta stole from it by overcharging the City of Rosemont for insurance premiums. The fact that

the City of Rosemont might have a claim against ABI/Acordia for the overcharges, however, does not alter the fact that ABI/Acordia suffered a direct pecuniary loss that is compensable under the MVRA. As the court below correctly observed: "Once [petitioner] reimburses [ABI/Acordia, it] will be able to repay Rosemont. Instead of determining the ultimate incidence of costs created by criminal activity, judges should direct restitution to the immediate victim; other persons' rights in the funds then may be sorted out under normal rules of contract and property law." Pet. App. 5.[2]

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[2] The cases on which petitioner relies (Pet. 20) do not assist him. As petitioner himself acknowledges, the court in *United States* v. *Randle*, 324 F.3d 550, 557 n.4 (7th Cir. 2003), expressly declined to address the issue that petitioner presses here. In *United States* v. *Shepard*, 269 F.3d 884 (7th Cir. 2001), the defendant fraudulently obtained employment as a hospital social worker, moved into a patient's home, and drained the patient's bank account. The hospital paid $165,000 to settle a lawsuit brought by the patient. The court of appeals held that the hospital was not a direct victim entitled to restitution because the hospital's loss "was derivative of [the patient's loss]." *Id.* at 886. Here, by contrast, ABI/Acordia was the direct victim because petitioner and Aulenta stole ABI/Acordia's money from its Premium Fund Trust Account.

In *United States* v. *Martinez*, 978 F. Supp. 1442 (D.N.M. 1997), the district court declined to award restitution to a casino from whom the defendant had stolen money because the operation of the casino was unlawful. The court acknowledged that the casino was entitled to restitution under the plain language of the MVRA but declined to make an award because the court believed that a restitution award would be "patently absurd." *Id.* at 1453. Whatever the merits of that decision, there is no suggestion in this case that ABI/Acordia's business was unlawful. Moreover, a conflict between the decision of the court of appeals in this case and a district court decision would not be a basis for this Court to grant a writ of certiorari. See Sup. Ct. R. 10; Robert L. Stern et al., *Supreme Court Practice* 237 (8th ed. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006

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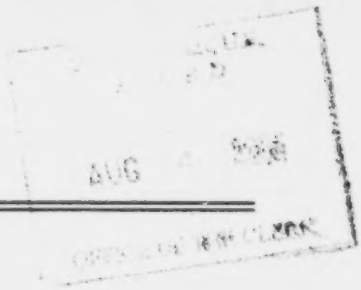

In The

Supreme Court of the United States

NICK S. BOSCARINO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY FOR THE PETITIONER NICK S. BOSCARINO

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TABLE OF CONTENTS

	Page
REPLY TO STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	2
I. THERE IS A CLEAR CIRCUIT SPLIT ON THE QUESTION OF WHETHER COURTS SHOULD PRESUME THAT A SENTENCE WITHIN THE RANGE ESTABLISHED BY THE UNITED STATES SENTENCING GUIDELINES IS REASONABLE	2
II. "HONEST SERVICES" FRAUD IS NOT A MONEY LAUNDERING PREDICATE ACT	6
III. RESTITUTION SHOULD NOT BE ORDERED WHEN THE "VICTIM" PARTICIPATED IN THE OFFENSE AND NEVER HAD ANY LEGAL ENTITLEMENT TO THE FUNDS FOR WHICH RESTITUTION WAS ORDERED	7
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Cleveland v. United States, 531 U.S. 12 (2000) 6

McNally v. United States, 483 U.S. 350 (1987) 6

Pasquantino v. United States, 544 U.S. 349 (2005) 6

Smith v. Doe, 538 U.S. 84 (2003) 3

United States v. Booker, 543 U.S. 220 (2005) 3

United States v. Dorcely, 2006 WL 2034245 (D.C.Cir. July 21, 2006) 5

United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005) 3

United States v. Smith, 445 F.3d 1 (1st Cir. 2006) 5

United States v. Watts, 519 U.S. 148 (1997) (*per curiam*) 5

United States v. Zavala, 443 F.2d 1165 (9th Cir. 2006) (*per curiam*) 4, 5

STATUTES

18 U.S.C. § 1341 6

18 U.S.C. § 1343 6

18 U.S.C. § 1346 6

18 U.S.C. § 3553 ..... 3, 5

18 U.S.C. § 3661 5

18 U.S.C. § 3663A 7

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

United States Sentencing Commission, *2005 Annual Report* 3

REPLY TO STATEMENT OF THE CASE

1. The government's Brief in Opposition states that during the period ABI/Acordia provided insurance brokerage services to Rosemont, "ABI/Acordia overcharged Rosemont for its services and kicked back part of the excess to petitioner." Govt's BIO, p. 2.

Petitioner, who was not an ABI/Acordia employee, however, lacked knowledge of its billing practices. Tr. 314. It was undisputed that the petitioner was unaware that ABI/Acordia had overcharged Rosemont. Tr. 294. In fact, the government's principal witness at trial, Ralph Aulenta, testified that the petitioner would have permitted cheating of Rosemont. Tr. 259-61.

2. The government's Brief in Opposition declares that, for each of the years in question, Aulenta caused ABI/Acordia to issue a check to one of the petitioner's corporations. Govt's BIO, p. 2. The Brief in Opposition further states that the petitioner did not deposit the funds into a corporate account, but rather endorsed the checks to Aulenta who returned half to the petitioner in monthly increments. *Id.*

These statements are inaccurate on a number of fronts. In 1994, ABI/Acordia issued the referral fee check to Aulenta. Tr. 182-83, 811. In 1991-1993 and 1995-1996, the checks were issued to one of the petitioner's corporations. Tr. 121-22, 142, 161-62, 170, 189, 194-96, 282, 316, 360-68, 403-09, 432, 745-46. In 1995 and 1996, the checks were deposited into the petitioner's corporate accounts. Tr. 541, 546, 995, 1445-46, 1450-51. Aulenta testified that he incrementally returned cash to the petitioner only in 1991 and 1992. Tr. 130-31, 164-69. Between 1993 and 1996, the funds were deposited into a joint trading account at

Charles Schwab. Tr. 173-74, 184, 192, 199, 543-46, 766-795, 773. Petitioner's demographic information was disclosed in that account. Tr. 287, 794.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR CIRCUIT SPLIT ON THE QUESTION OF WHETHER COURTS SHOULD PRESUME THAT A SENTENCE WITHIN THE RANGE ESTABLISHED BY THE UNITED STATES SENTENCING GUIDELINES IS REASONABLE

a. Petitioner will reply to the second issue in his *certiorari* petition first. The government's Brief in Opposition effectively discloses the split among the circuit courts of appeal on the question of whether a sentence within the range established by the United States Sentencing Guidelines should be presumed reasonable. Govt's BIO, pp. 10-11.

This is not a circuit split in which a lone court of appeals has taken a view contrary to other circuits. Rather, as described in the Brief in Opposition, six circuits has held in favor of the presumption, while four circuits have not. In fact, as discussed below, *all* the circuits have issued opinions discussing the issue.

The government opposes the petitioner's request for *certiorari* on two grounds. First, the government questions the materiality of the difference among the standards announced by the circuits. Second, the government says that it is too early for this Honorable Court to address the split.

With respect to the materiality question, the government cannot dispute that presumptions are a significant legal tool. A presumption may often be outcome-determinative. In a close case or one of equipoise, a presumption will make a material difference. *Cf. Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring).

Moreover, the government fails to cite any pronouncement from this Honorable Court to the effect that the sentencing guidelines should be given more weight than other factors listed in 18 U.S.C. § 3553(a). Nor does the government point to a statute that provides authority for the presumption created in *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005), and followed in other cases.

The government's timing argument pays short shrift to the nature of the underlying proceeding – federal criminal sentencing. Sentencing hearings occur on a daily basis in the district courts. For example, the United States Sentencing Commission's *2005 Annual Report* noted that the Commission had received data on 72,462 sentences handed down between October 1, 2004 and September 30, 2005. Sentencings in 53,674 of these cases occurred after *United States v. Booker*, 543 U.S. 220 (2005).

The frequency with which sentencings occur underscores the importance of the question presented. The question presented not only affects the standard of review employed by courts of appeal, but it also affects sentencing methodology at the district court level. It is one thing for district courts, in fashioning sentences, to treat the guidelines as one of several equal factors. It is quite another for district courts to consider the sentencing guidelines as presumptive, as here.

The Ninth Circuit recently captured this point in *United States v. Zavala*, 443 F.2d 1165, 1170 (9th Cir. 2006) (*per curiam*):

> While an appellate court will review the sentencing result to see if it comes within the extended territory of reasonableness, and will merely conduct a periplus of the borders of that territory, the district court has a very different charge. It is sentencing an individual, and its task is to attempt to find the most reasonable sentence for that person within the territory of all possible reasonable sentences. That difference in charge is central; it is not simply semantical. The difference in approach can be captured in the difference between starting points and presumptions. The former bespeak a mind open to all of the nuances and possibilities of the human condition that district judges are so good at perceiving. The latter bespeaks a mind which is rather closed unless it can be pried open by something truly extraordinary. It harkens back to Guideline "departures," which were expected to be quite extraordinary. *See* USSG § 1A1.1 ed. n. 4(b). To put it another way, even though it is very likely that the Guideline calculation will yield a site within the borders of reasonable sentencing territory, that still does not mean either that there are no other sites within those borders, or that one of them will not prove to be the most reasonable sentence for the particular individual, or that the district court should resist being led to another site, or that the district court should not strive to reach the best site.

Nor is this an instance in which more time is needed for the circuits to weigh in on the issue. The two circuits not cited in the Brief in Opposition have discussed the

issue. In *United States v. Dorcely,* 2006 WL 2034245 (D.C.Cir. July 21, 2006), the D.C. Circuit recently held that a properly-calculated sentence within the guidelines range is entitled to a rebuttable presumption of reasonableness. In *Zavala*, the Ninth Circuit – which has spoken in terms of using the guidelines as a "starting point" – purported not to formally opine on the presumption issue, but found that a district court that "makes the Guideline calculation *the* presumptive sentence . . . commit[s] legal error by misapplying § 3553(a)." 443 F.2d at 1170.

At this juncture, every circuit has discussed the issue raised in the *certiorari* petition. Additional time to receive the benefit of additional judicial thinking is unnecessary. The issue is important, as it plays a role in every sentencing that occurs in the federal courts. Uniformity in the law is something to be strived for, especially with respect to sentencing. At this point, that ideal is not being achieved.

b. In his *certiorari* petition, the petitioner contested the disparity between his sentence and the one imposed on his co-defendant, Aulenta. Disparity in sentencing is a factor set forth in 18 U.S.C. § 3553(a)(6).

Citing *United States v. Smith*, 445 F.3d 1, 5 (1st Cir. 2006), the government asserts that any disparity comparison must be made on the basis of sentences imposed on classes of similarly-situated offenders nationwide, as opposed to a co-defendant's sentence. Nothing in § 3553(a)(6), however, limits disparity comparisons to nationwide comparisons. The gloss proposed by the government is also inconsistent with 18 U.S.C. § 3661 which places no limitation on the consideration of information in connection with sentencing, *cf. United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*), to say nothing of the practical difficulty of

performing a *timely* nationwide disparity comparison at a sentencing hearing.

II. "HONEST SERVICES" FRAUD IS NOT A MONEY LAUNDERING PREDICATE ACT

The government concedes that the statute making it a federal crime to deprive another of "the intangible right to honest services," 18 U.S.C. § 1346, is not denoted as a predicate act in the money laundering statutes. Govt's BIO, p. 6. Like the court of appeals, the government asserts that this does not matter because § 1346 is a "definitional" statute. The government, however, does not argue, nor could it, that 18 U.S.C. §§ 1341 and 1343, standing alone, criminalize a scheme to defraud another of "the intangible right to honest services." Furthermore, no case from this Honorable Court has held that a statute that Congress has failed to include in a listing of predicate acts may nonetheless qualify as a predicate act.

The government resists the petitioner's argument that an "honest services" fraud scheme does not itself produce a tangible, recognized property interest capable of being laundered in a monetary transaction (necessary for a money laundering offense). The government's position does not account for this Court's pronouncements that the mail and wire fraud statutes (§§ 1341 and 1343) require that the "object of the fraud . . . be [money or] property in the victim's hands." *Pasquantino v. United States*, 544 U.S. 349, 355 (2005) (quoting *Cleveland v. United States*, 531 U.S. 12, 26 (2000)). The "object of the fraud" in a scheme to deprive another of the right to "honest services" is intangible, and cannot be laundered in a financial transaction. *Cf. McNally v. United States*, 483 U.S. 350 (1987).

III. RESTITUTION SHOULD NOT BE ORDERED WHEN THE "VICTIM" PARTICIPATED IN THE OFFENSE AND NEVER HAD ANY LEGAL ENTITLEMENT TO THE FUNDS FOR WHICH RESTITUTION WAS ORDERED

The government concedes that ABI/Acordia "overcharged Rosemont for its services." Govt's BIO, p. 2. As a participant in the fraud on Rosemont, ABI/Acordia simply cannot be considered a "victim" within the meaning of the Mandatory Victims Restitution Act of 1996 ("MVRA"). 18 U.S.C. § 3663A(a)(2). Because ABI/Acordia had no legal entitlement to the overcharged funds in the first place, it did not suffer a "pecuniary loss" within the meaning of MVRA. The holding endorsed by the government condones, and even rewards, criminal behavior.

CONCLUSION

WHEREFORE, Petitioner Nick S. Boscarino respectfully prays that this Honorable Court grant his petition for *certiorari*, issue a writ of *certiorari* to vacate or review the judgment of the Seventh Circuit, remand for further consideration, hold the petition and remand for further consideration in light of *Cunningham v. California*, *cert. granted*, No. 05-6551 or any other case touching upon the issues presented in the *certiorari* petition and/or grant any other appropriate relief.

Respectfully submitted,

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